In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75-1850

JOHN F. DONAHUE,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

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Supreme Court of the United States.

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No.

JOHN F. DONAHUE,
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v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for Writ of Certiorari
to the Supreme Judicial Court of Massachusetts.

Opinion Below.

The opinion of the Supreme Judicial Court of Massachusetts, decided March 23, 1976, is reported at 1976 Mass. Adv. Sh. 793, 344 N.E. 2d 886.

Jurisdiction.

The judgment of the Supreme Judicial Court of Massachusetts was entered on March 23, 1976. A petition for rehearing was denied on April 13, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented.

1. Did the deliberate refusal of the district attorney, following allowance of appropriate motions filed by the petitioner, to provide exculpatory evidence, and a statement of promises, rewards or inducements, violate the due process clause of the Fourteenth Amendment to the Constitution of the United States?

2. Did restriction of cross-examination of the principal witness about the crime in which he participated, where he had been granted transactional immunity, deny to the defendant the right of confrontation?

3. Did restriction of cross-examination of the principal witness concerning promises, rewards or inducements made to him constitute a denial of confrontation?

4. Was the petitioner's conviction so totally devoid of evidentiary support as to be invalid under the due process clause of the Fourteenth Amendment?

5. Did the negligent use of false and misleading evidence by the district attorney deprive the petitioner of due process?

6. Was the conduct of the prosecution, when viewed in its totality, violative of due process?

7. Was the cumulative error committed by the trial judge so prejudicial as to deny the petitioner due process?

Constitutional Provisions Involved.

CONSTITUTION OF THE UNITED STATES, AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV, SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case.

Petitioner, chief of police of the town of Stoughton, Massachusetts, was charged in an indictment returned by the grand

jury on October 15, 1974, with receiving stolen goods (electrical heating ducts), knowing the same to have been stolen (R. 1). Following arraignment, several discovery motions were filed. Among them were: motion to be furnished with evidence favorable to the accused (R. 13), motion to be furnished with statements of promises, rewards or inducements (R. 16), motion for list of names and addresses of witnesses who were summonsed to testify before the grand jury (R. 19), and motion for inspection of grand jury minutes (R. 18). All of these motions were allowed (R. 14, 16, 18 and 19). With respect to the grand jury minutes, the prosecution was to make available no sooner than ten days before trial all minutes leading to the indictment (R. 18). The prosecution responded that it had no exculpatory evidence (R. 15); that it had no knowledge of any promises, rewards or inducements (R. 17); that Brian Fernald and petitioner testified before the grand jury (R. 20); and, in response to the allowance of the motion to inspect grand jury minutes, the prosecution furnished the statement of Fernald which had been read to the grand jury (Tr. of Mot. For New Trial 7/3/75, p. 21) and the grand jury testimony of the petitioner.

At the trial the prosecution presented four witnesses, Harvey Freedman, an electrical contractor and owner of the Harvard Electric Company; Brian Fernald; Lt. William Bergin of the State Police; and Sgt. John Ruane of the Canton, Massachusetts, Police Department. Their testimony, on direct examination, was as follows:

Freedman testified that in December of 1973 he was doing a job at the Bel-Nel Gardens on River Street in Hyde Park, Massachusetts (Tr. 39); that on December 17 a batch of electrical heating and lighting fixtures were stolen (Tr. 39-40); that the make of the electrical heating units was "Singer" (Tr. 40). Freedman was shown some electrical heating units

which he identified as having been stolen in Hyde Park (Tr. 43).

Brian Fernald testified that on December 17, 1973, he met with Thomas Allen, a police officer in Stoughton, Massachusetts, who gave him keys to a station wagon owned by one Joan Nardozzi; that around 3:30 p.m., he and one Jackie Gregory drove to the Bel-Nel Gardens in Hyde Park where they stole a number of electrical heating units and lighting fixtures (Tr. 79-81). Fernald testified that after stealing this material he and Gregory drove to Stoughton to the home of one Jeff Gambrazzio and sold the electrical heating units to him for $750 (Tr. 82-84). Further, he testified that Allen came to Gambrazzio's house and took three of the units to Joan Nardozzi's house which was across the street (Tr. 85); that then he, Allen and Gregory took twelve units to petitioner's house; that he and Gregory remained in the station wagon while Allen went into petitioner's house; that petitioner and Allen came outside and one of them pointed to the garage, and he and Gregory put the units there (Tr. 85-87). Fernald, however, never spoke with the petitioner (Tr. 87). Fernald identified the units in court, previously identified by Freedman, as being similar to the ones he placed in the petitioner's garage (Tr. 82).

On cross-examination, Fernald stated that he had kept six of the light fixtures, stolen at the same time as the electrical heating units, for himself. When asked where the fixtures were now, he refused to answer (Tr. 164-165). Fernald had been granted transactional immunity (Tr. 65, 71). The trial judge, when reminded of this fact, asked the prosecutor for comment. The prosecutor responded, "My understanding, your Honor, of your prior order causes me to object to that question." The trial judge then excluded the question (Tr. 165).

Further, on cross-examination, Fernald stated that on the day he was to appear before the grand jury, he was in Boston, and that he made a telephone call to Lt. Bergin. The trial judge refused to permit further cross-examination about the call (Tr. 139). Counsel made an offer of proof which showed that if permitted to testify the witness would say that he was in jail in Boston and had called Lt. Bergin for help (Tr. 139).

Lt. Bergin testified that he interviewed petitioner at the Stoughton police station on June 4, 1974, in the presence of town counsel, Mr. McParland (Tr. 172); that he presented a statement of Fernald taken on May 22 which McParland read aloud; and, when McParland reached the point about delivery of the electrical heating units, petitioner remarked that he had seen heaters in his garage but did not know how they got there had spoken to an electrician regarding putting heat in the second floor of the house (Tr. 173).

On cross-examination Bergin testified that petitioner had invited him to the house to search (Tr. 177).

Sgt. Ruane testified that after talking with Fernald on May 21, 1974, he procured a search warrant for Gambrazzio's residence (Tr. 179). He identified the electrical heating units, previously identified by Freedman as belonging to him and being stolen in Hyde Park, as being the same ones he had taken from the Gambrazzio home pursuant to the search warrant (Tr. 180). This testimony was objected to by counsel (Tr. 180).

After the testimony of Sgt. Ruane, the prosecution rested (Tr. 181). Whereupon, counsel moved to strike the electrical heaters from evidence because they had not been connected to the petitioner (Tr. 182). The motion was denied.

At the close of the prosecution's case a motion for directed verdict was also filed (Tr. 184, R. 28). The motion was denied (Tr. 190).

Three witnesses were called to testify for the petitioner. They were Janet Fernald (Brian's aunt); Jeff Gambrazzio; and the petitioner.

Janet Fernald testified that sometime after May of 1974 she had a conversation with Brian Fernald concerning the theft of the electrical heating units; that she also conferred with Fernald concerning the petitioner; and that Brian told her that he never had any dealings with the petitioner and did not even know him (Tr. 195-196).

Gambrazzio testified that he was an electrician (Tr. 201); that sometime during the beginning of December, 1973, he went to petitioner's home for the purpose of looking at the second floor in order to determine the possibility of installing electric heat in the bedrooms (Tr. 202-203); that he ordered supplies for the job, including electrical heaters (Tr. 206); that he delivered the supplies to petitioner's home at a time when no one was there, and that he placed the heaters in the garage (Tr. 207, 217); and that later he was told that petitioner did not want the job done because it was an older house and it did not have insulation in the walls or attic. Whereupon he picked up the units from petitioner's garage and installed them in his own house (Tr. 211).

On cross-examination Gambrazzio was asked by the prosecutor if he had ever installed any electrical heating units in Joan Nardozzi's house (Tr. 213). When Gambrazzio responded affirmatively, he was asked, "When?" To this question he answered, "November — December, 1973" (Tr. 213).

Petitioner testified that he saw heaters in his garage but they were in boxes longer than the units which had been admitted into evidence (Tr. 228).

At the close of petitioner's case, counsel again moved to strike the electrical heating units from evidence, and for a directed verdict. Both motions were denied (Tr. 240).

The jury found the petitioner guilty, and the judge sentenced him to the house of correction for one year, suspended the sentence, and placed petitioner on probation for two years.

Following conviction, petitioner filed a motion for a new trial (R. 30). This motion was based on the fact that the prosecution had withheld exculpatory evidence. The evidence was the grand jury testimony of Jackie Gregory. This testimony contradicted the statements and testimony of Fernald. (Statement of Fernald attached as Appendix C, and grand jury testimony of Gregory attached as Appendix D.)

The motion was based also on the failure of the prosecution to disclose a promise made to Fernald. In an affidavit of counsel it is stated that a police report containing a promise to Fernald was made available after Fernald had testified (R. 32-33).

The motion was denied (R. 38) and petitioner claimed an exception (R. 39).

Petitioner then filed a motion to inspect the grand jury minutes of Gregory (R. 43). However, the judge made an *in camera* inspection of the minutes, ruled that they contained no exculpatory evidence, and denied the motions (R. 43).

Petitioner filed another motion for a new trial on the basis that the prosecution had filed false and misleading answers in responding to orders for discovery. At a hearing on this motion, in addition to what was alleged, counsel argued that the prosecution had withheld exculpatory evidence; had withheld statements of promises, rewards or inducements; and that the prosecution had used false and misleading evidence (Tr. Mot. For New Trial 7/3/75 pp. 1-38). The trial judge entered a finding and order denying the motion (R. 54).

Petitioner claimed exception (R. 57) and filed assignment of errors for appeal (R. 58). Following argument, the Supreme Judicial Court affirmed the conviction. *Commonwealth* v. *Donahue*, 1976 Mass. Adv. Sh. 793, 344 N.E. 2d 886.

Reasons for Granting the Writ.

THE SUPREME JUDICIAL COURT HAS DECIDED FEDERAL QUESTIONS OF SUBSTANCE IN A WAY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

1. *The Deliberate Suppression of Evidence Favorable to the Accused Flies Directly in the Face of the Brady Doctrine.*

In *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The prosecutor in the instant case intentionally withheld from the petitioner the grand jury testimony of one Jackie Gregory which contradicted in every material aspect a statement made by the principal witness. The prosecutor claimed that the Gregory testimony was not exculpatory. The trial judge agreed (R. 43). The Supreme Judicial Court avoided the issue by saying that it was not clear that petitioner would gain any exculpatory advantage because the jury could disregard any testimony of Gregory as being unreliable.

We submit, however, that whether or not the jury would have believed Gregory is not the most important point. What is important, and what rises to a constitutional level, is the fact that petitioner had a right to present this evidence to the jury for consideration. This Court has held that, since the reliability of a witness may be determinative of guilt or innocence, nondisclosure of evidence affecting credibility is exculpatory. *Giglio* v. *United States*, 405 U.S. 150, 154 (1972). Therefore, the denial by Gregory before the grand jury that he participated in the theft and delivery of the electrical heating

units with Fernald was clearly exculpatory. Such evidence, if presented to the jury, could definitely affect the credibility of Fernald. This is especially true since Fernald admitted lying on several occasions (Tr. 143, 146, 147, 148, 152).

We respectfully submit, therefore, that the instant case meets the three-pronged test enunciated by this Court in *Moore* v. *Illinois*, 408 U.S. 786, 794-795 (1972), *i.e.*, (a) the evidence was suppressed after a request by petitioner, (b) the evidence was favorable, and (c) the evidence was highly material.

2. *The Failure of the Prosecution to Furnish a Statement of Promises, Rewards or Inducements was Contrary to the Holding of this Court in Giglio.*

The failure of the prosecution to disclose all promises, rewards or inducements made to the principal witness, Fernald, which would have been relevant to his credibility, was a violation of due process. *Giglio* v. *United States*, *supra*. The prosecution was aware of a promise made by members of the Canton police department because a police report containing a promise was made available, but after the principal witness had left the stand (R. 33). This report shows that a promise to try and keep Fernald "on the street" was made when Fernald was first arrested, and when he told for the first time about the alleged criminal activity of petitioner (R. 35).

It is true that Fernald denied that any promises were made to him, but this, too, is not the most important thing. Indeed, in *Giglio* the witness also denied that any promises had been made to him. What is important is that a promise was made, and it was not disclosed to petitioner in time for him to use in cross-examination of the principal witness.

The prosecutor also failed to disclose the fact that the principal witness had been threatened by him. The principal witness was told that he was facing 17 years in prison on outstanding charges, and that he would be "crazy to take a prison term" (Tr. 145). If this is not a threat, it is certainly an inducement. But it was not revealed to petitioner at any time prior to trial. In fact, it was brought out by the prosecutor on redirect examination, a tactic, we suggest, designed to take the sting out of such testimony.

3. *The Restriction of Cross-Examination of the Principal Witness Denied the Petitioner the Right of Confrontation.*

There is no doubt that the right granted to an accused by the Sixth Amendment to confront witnesses against him, which includes the right of cross-examination, is a fundamental right made obligatory on the States by the Fourteenth Amendment. *Pointer* v. *Texas*, 380 U.S. 400 (1965). This right embraces not only the opportunity to cross-examine per se, but to delve into specific relevant matters. *Smith* v. *Illinois*, 390 U.S. 129 (1968); *Alford* v. *United States*, 282 U.S. 687 (1931).

In *Smith* and *Alford*, this Court held that upon cross-examination a defendant was entitled to elicit from a witness his name and current address. The Court reasoned in *Smith* that: "The witness' name and address open countless avenues of in-court examination and out-of-court investigation." *Id.* at 131. The same is true in the instant case, *i.e.*, disclosure of what the principal witness did with other goods stolen at the same time as the electrical heating units could have opened other avenues for the petitioner to explore.

The principal witness had been granted transactional immunity; therefore, nothing relevant to this action about which he would be required to testify could be used against

him. *Smith* v. *United States*, 337 U.S. 137 (1949). Moreover, the witness had been permitted to testify as to what happened to the other stolen goods (Tr. 83, 85, 88).

The Supreme Judicial Court stated that the trial judge could have felt that the excluded questions sought information not related to the theft at Bel-Nel Gardens. We suggest, however, that nothing in the record supports this view. The witness testified that, in addition to the electrical heating units, he stole some screw guns, a skill saw, and some lighting fixtures (Tr. 154). If indeed he had been granted transactional immunity, it is unclear just how the theft of the other materials would not be covered by this immunity. It was, after all, one transaction in which several different items were stolen. The fact that some of the items might be considered burglarious instruments is of no consequence. The fact still remains that if they were stolen from the Bel-Nel Gardens at the same time as the electrical heating units, and the witness had been granted transactional immunity, the testimony of the witness could not have been used against him.

Moreover, the witness, having freely answered other questions dealing with the theft of the goods and their disposition, could not claim the privilege against self-incrimination. *Rogers* v. *United States*, 340 U.S. 367 (1951). Therefore, the discussion by the Supreme Judicial Court as to the trial judge's caution with respect to self-incrimination was totally inappropriate to this situation.

We respectfully suggest, therefore, that error of constitutional dimension was committed by the trial judge when he refused to permit petitioner to inquire about the disposition of other items stolen. This is especially true since transactional immunity accords full immunity from prosecution for an offense to which the compelled testimony relates. *Kastigar* v. *United States*, 406 U.S. 441, 453 (1972).

4. *Refusal to Permit Petitioner to Inquire of the Principal Witness about Favors Done for Him by the Prosecution was a Denial of Confrontation.*

The trial judge refused to permit cross-examination of the principal witness concerning a telephone call he made to the State Police (Tr. 139). From the offer of proof, it would appear that as a result of this call the principal witness was released from jail in Boston where he had been arrested on other charges. Such a favor could well be an inducement to testify. And refusal to permit its exploration designed to impeach credibility was a denial of confrontation. *Davis* v. *Alaska*, 415 U.S. 308 (1974).

The Supreme Judicial Court was of the opinion that the instant case fell short of the crucial jury issues in *Davis*. We suggest, however, that the opposite was true. Where the witness had already admitted lying, disclosure of favors not directly related to the case could well have caused the jury to be suspect of his testimony. We further suggest that, just as the jury in *Davis* was entitled to know of the witness' juvenile record in assessing credibility, so too was the jury entitled to know of any favors done for the principal witness in this case in order to do the same.

5. *Petitioner's Conviction was Devoid of Evidentiary Support; Therefore, it was Invalid under the Due Process Clause.*

In advancing this proposition we are mindful that: "Decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all." *Thompson* v. *Louisville*, 362 U.S. 199, at 199 (1960).

It is our contention that there was no evidence at all with respect to the charge.

The evidence presented by the prosecution amounted to no more than a charge that stolen electrical heating units were delivered to petitioner's garage. The principal witness, who says he made the delivery, admitted that he never spoke with petitioner (Tr. 87). There was, in fact, no witness to testify about any conversation with the petitioner relative to the heaters. Therefore, no evidence exists from which a jury could even infer knowledge on the part of petitioner that the heaters were stolen. This would be true even if we accept the story of the principal witness.

But considering the testimony of the defense, as the Court did in *Thompson*, it seems clear that the conviction did not rest upon any evidence of the elements of the crime required to be proved.

6. *The Right of the Petitioner to Due Process was Violated by the Prosecution's Use of False and Misleading Evidence.*

The principal witness testified that three of the electrical heating units were delivered to Joan Nardozzi's house (Tr. 85). On cross-examination of the defense witness, Gambrazzio, the prosecutor elicited evidence that such units had been installed in the Nardozzi house in December of 1973 (Tr. 213). The prosecutor also made reference to the Nardozzi house in his closing argument (Tr. Closing Arguments, p. 30). The impres-
impression conveyed to the jury was that the stolen heaters had been installed in the Nardozzi house. This was not true, as the prosecutor knew or should have known. Lt. Bergin, who worked out of the prosecutor's office, had been to the Nardozzi home with Captain Kelly and discovered that the

units installed were not those stolen from Bel-Nel Gardens (Tr. Mot. For New Trial 7/3/75 pp. 9-10).

It is now well settled that the knowing use of false evidence by the prosecution constitutes a denial of due process. *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Mooney* v. *Holohan*, 294 U.S. 103 (1935). By asking certain questions of the defense witness the prosecutor knew that he was creating a false impression. We suggest that this procedure is no different from the direct introduction of such evidence.

The prosecutor maintains that he did not know that the evidence was false (Tr. Mot. For New Trial 7/3/75, p. 33). However, a member of his staff, Lt. Bergin, knew the evidence was false. The knowledge of Lt. Bergin can be attributed to the prosecutor. *Cf. Giglio* v. *United States*, *supra*, at 154. Therefore, a disclaimer is not available to the prosecutor.

When the record of this case is viewed as a whole, it seems clear that misleading the jury about this evidence may well have had an effect on the outcome of the trial. Hence, there was a violation of due process. *Napue* v. *Illinois*, *supra*.

7. *The Methods Used by the Prosecution, When Viewed Collectively, were Violative of Due Process.*

The entire course of conduct on the part of the prosecution was not consistent with fair play. To begin with, only police officers were indicted. We hasten to add that we are well aware of the doctrine of prosecutorial discretion. However, it is the very exercise of this discretion which leads to the conclusion that due process was not accorded the petitioner. Fernald, the principal witness, testified that he and Gregory had stolen the heaters and delivered them to the petitioner's house. Gregory denied these allegations. Yet, Gregory was

not indicted for larceny; nor was he indicted for perjury (Tr. Mot. For New Trial 7/3/75, p. 28). Even though Fernald stated that heaters were delivered to the homes of Gambrazzio and Nardozzi, neither one was indicted for receiving these stolen goods.

Secondly, the prosecution deliberately withheld exculpatory evidence. The grand jury testimony of Gregory denying the allegations made by Fernald was never given petitioner. However, it was given to Thomas Allen, the other police officer indicted, and it was given as exculpatory evidence (Tr. Mot. For New Trial 7/3/75, pp. 2, 34).

Thirdly, the prosecution steadfastly maintained that there were no promises, rewards or inducements. But, in fact, a promise had been made by Officer Rafferty (R. 35) about which the prosecution was well aware. This was a promise "to keep Fernald on the street." Additionally, the prosecutor himself had talked with Fernald and threatened him with 17 years in jail if he did not testify (Tr. 145). This clearly was not a promise, but it was an inducement — one which the prosecutor later admitted may have led the witness to believe that he would be given consideration in recommending disposition on pending cases (Tr. Mot. For New Trial 7/3/75, pp. 25-26).

Lastly, as discussed above, the prosecutor knowingly misled the jury in believing that three of the stolen heaters had been installed in the Nardozzi house, a fact he is charged with knowing to be untrue.

In *Rochin* v. *California*, 342 U.S. 165 (1952), this Court reversed a conviction because the methods used to obtain it were violative of due process. To be sure, the instant case does not involve trying to extract evidence from the body by force as was the case in *Rochin*, but it nonetheless involves conduct which, when viewed in its totality, offends the canons

of decency and fairness. *Malinski* v. *New York*, 324 U.S. 401, 416-417 (1945) (Frankfurter, J., concurring).

8. ***The Errors Committed at Trial were So Numerous that their Collective Impact Resulted in the Petitioner being Denied Due Process.***

The importance of exploring what the principal witness did with all of the stolen goods has been discussed above — likewise, the crucial aspect of eliciting on cross-examination favors provided the principal witness. Standing alone, each denial of such cross-examination is enough to deny to petitioner a fair trial. But when viewed together, it is readily seen that petitioner was devastated in his attempt to exercise his right of confrontation.

There was absolutely no evidence from which the jury could even infer that the petitioner possessed stolen goods knowing them to be stolen. The heaters were not found in his home; there was no testimony from anyone about any conversation with petitioner concerning the heaters; and there was uncontradicted testimony that petitioner had considered installing electric heat and that heaters for this purpose were stored in his garage by the electrician. Therefore, we submit, the trial judge erred in denying motions for directed verdict.

Perhaps more crucial, however, was the failure of the judge to charge the jury with respect to the credibility of an accomplice. The charge with respect to credibility concerned ordinary witnesses (Tr. Charge To Jury, p. 8). And, with respect to immunization, the charge only concerned the fact that corroboration of immunized testimony was required (Tr. Charge to Jury, pp. 13-14). This was not enough. This Court, long ago, held that a witness who was a participant in the crime is not an ordinary witness. *Crawford* v. *United States*, 212 U.S. 183 (1909). The Court said:

> But the evidence of a witness, situated as was Lorenz, is not to be taken as that of an ordinary witness, of good character, in a case whose testimony is generally and *prima facie* supposed to be correct. On the contrary, the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses. 212 U.S. at 204.

The petitioner did not request that the jury be so charged, but it is our contention that the trial judge should have done so *sua sponte*. We so contend because of the further language of the Court in *Crawford*:

> The facts surrounding this case make it particularly important that the rule in regard to material errors should be most rigidly adhered to. If it be not clear that no harm could have resulted from the commission of this material error, the judgment should be reversed. 212 U.S. at 204.

Without repeating all that has been said above, we strongly suggest that it was particularly important in this case for the trial judge, *sua sponte*, to give the so-called accomplice charge with respect to credibility.

After conviction, petitioner first moved for a new trial on the ground that exculpatory evidence had been withheld. The trial judge, in denying the motion, ruled that the grand jury testimony of Gregory was not exculpatory as to the petitioner (R. 43). Such a ruling served only to compound the numerous errors already committed.

Finally, the trial judge denied the second motion for a new trial partially on the ground that no promises had been made to the principal witness by the prosecutor. At the hearing petitioner presented six certified copies of convictions showing that, just three days after completion of petitioner's trial, the principal witness, Fernald, appeared before the Stoughton District Court and received probation in all six cases (Tr. Mot. For New Trial, p. 12). The prosecutor denied making any recommendation in those cases (Tr. Mot. For New Trial, p. 25), and based on this denial the trial judge made a finding that the district attorney's office made no recommendation as to disposition in the Stoughton District Court (R. 56). We believe this to be error.

In the first place, an evidentiary hearing on the question should have been held. Considering the criminal history of Fernald (Tr. Mot. For New Trial 7/3/75, pp. 11-13) such lenient treatment automatically raises an inference of a "deal." If indeed an inference is raised, as we suggest, an evidentiary hearing was required to explore fully the situation.

Secondly, the prosecutor said he made no recommendation, and that another assistant told him that he had not done so (Tr. Mot. For New Trial 7/3/75, p. 25). From these representations the trial judge could not possibly find as a matter of fact that no member of the district attorney's office made any promises to Fernald. To resolve the question an evidentiary hearing was required. The fact that two assistants made no promises does not end the matter. As the Court said in *Giglio* v. *United States, supra*, at 154:

> The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.

It is respectfully submitted that the trial judge committed several federal constitutional errors, each being so basic that reversal is required. However, when these errors are viewed as a whole, it seems abundantly clear that substantial rights of the petitioner to confrontation and due process were violated. See *Chapman* v. *California*, 386 U.S. 18 (1967).

Conclusion.

Because of the serious constitutional errors we allege were made by the trial judge, and the subsequent affirmance by the Supreme Judicial Court of Massachusetts, the petitioner respectfully urges that certiorari be granted.

Respectfully submitted,

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Appendix A.

SUPREME JUDICIAL COURT.

COMMONWEALTH *vs.* JOHN F. DONAHUE.

Norfolk. January 5, 1976. — March 23, 1976.

Present: Hennessey, C.J., Reardon, Braucher, Kaplan, & Wilkins, JJ.

Receiving Stolen Goods. Practice, Criminal, Grand jury proceedings: stenographer; Disclosure of evidence; Suppression of evidence by prosecutor. *Grand Jury. Witness,* Immunity. *Evidence,* Corroborative evidence, Immunized witness, On cross-examination. *Superior Court,* Grand jury proceeding: stenographer.

INDICTMENT found and returned in the Superior Court on October 15, 1974. The case was tried before *Zarrow, J.* The Supreme Judicial Court granted a request for direct appellate review.

Melvin S. Louison (*Jerry E. Benezra* with him) for the defendant.

Thomas J. May, Assistant District Attorney, for the Commonwealth.

HENNESSEY, C.J. This is an appeal under G.L. c. 278, §§ 33A-33G, following a verdict of guilty on an indictment for receiving stolen property. The defendant was sentenced to one year in a house of correction, which sentence was suspended and the defendant was placed on probation for two years. Subsequently, the defendant's motion for stay of

execution of said sentence was allowed by the judge. Thereafter, the defendant filed three separate motions for new trials, which motions were denied and to which denials exceptions were duly saved.

Upon review of the assignments of error, we conclude that there was no error and that the judgment shall be affirmed.

The facts are as follows. The Commonwealth presented its case through four witnesses: Brian Fernald, who testified under a grant of transactional immunity; Harvey Freedman; Canton police detective Sergeant John Ruane, Jr.; and State police detective Lieutenant William Bergin. The Commonwealth also introduced in evidence thirteen Singer brand electrical heating units.

Essentially, the immunized witness, Brian Fernald, testified that on December 17, 1973, he met with one John Gregory and Stoughton police officer Thomas Allen. Following a conversation with Allen, Fernald was given a car by Allen and Fernald and Gregory proceeded to the construction site of Belnel Gardens in the Hyde Park section of Boston, where they stole approximately seventy electrical baseboard heaters, some light fixtures and some tools. They placed the stolen goods into the car and then returned to Stoughton to the home of Jeffrey Gambrazzio. Allen removed three of the heaters from the car and took them across the street to the home of Joan Nardozzi; twelve of the heaters were left in the car and the remainder were sold to Gambrazzio. Fernald, Allen and Gregory then drove to the defendant's home in Stoughton. The defendant was at the time the police chief of Stoughton. In the presence of the defendant and Allen, Fernald and Gregory unloaded the twelve heaters and placed them in the defendant's garage. This was done after the defendant conferred with Allen, and then pointed or gestured toward the defendant's garage. Fernald identified the

Commonwealth's exhibits 1A-1L as being the units he stole from Belnel Gardens and delivered to the defendant.

Harvey Freedman testified that he was an electrical contractor and was performing electrical work at Belnel Gardens during December of 1973. He testified that between fifty to 100 Singer brand electrical heating units were stolen from the construction site and he identified the Commonwealth's exhibits 1A-1L as belonging to him and as being the same units he had been installing in Belnel Gardens.

Sergeant John Ruane, Jr., testified that as a result of a conversation with Fernald on May 21, 1974, he obtained a warrant to search the home of Jeffrey Gambrazzio. He identified the Commonwealth's exhibits 1A-1L as being the same units he removed from Gambrazzio's home under the terms of the search warrant.

Lieutenant William Bergin testified that on June 4, 1974, he met with the defendant, the defendant's attorney and others. At this meeting Bergin presented the defendant's attorney with a stenographic copy of Fernald's statement made to an assistant district attorney and Bergin on May 22, 1974. As the defendant's attorney read the statement aloud, the defendant remarked at one point that he had seen electrical heating units in his garage but, in response to a question from Bergin, the defendant stated that he did not know who delivered them to his garage, who removed them, or where they were then located.

Gambrazzio testified that he is a licensed electrician and knew the defendant. At the request of Stoughton police officer Thomas Allen he visited the defendant's home, estimated an electrical job and subsequently did deliver heating units to the defendant's garage which were other than Singer brand units. He further testified that he knew the immunized witness, Fernald, and had worked with him at Joan Nardozzi's home where Gambrazzio had installed electri-

cal heating units. Gambrazzio was unable to identify the Commonwealth's exhibits 1A-1L as being the same units that were taken from his home under the provisions of a search warrant by the Canton police.

The defendant testified that Fernald had never been at his house. The defendant admitted seeing electrical heating units in his garage but did not know who delivered them or who removed them.

1. There was no error in the denial by the judge of the defendant's motion to dismiss or for other appropriate relief for an alleged violation of Rule 63 of the Superior Court (1974).

Rule 63 reads as follows: "*Stenographic notes* of all testimony given before any grand jury shall be taken by a *court reporter*, who shall be appointed by a justice of the superior court and who shall be sworn. Unless otherwise ordered by the court, the court reporter shall furnish transcripts of said notes only as required by the district attorney or attorney general" (emphasis supplied).

The defendant argues that, in violation of the rule, the district attorney used a secretary-employee from his office who was not fully trained as a court reporter. Further, the secretary utilized a tape recorder rather than the usual transcription methods.

It is clear, at least, that the woman was sworn in by the presiding judge as a "reporter" for the grand jury. In any case, we need not further consider whether the rule of court was violated, since no prejudice to the defendant has been shown. The defendant points to one mistake in the transcript of the testimony of a witness. Arguably this was a serious error, but it was rectified before trial and the trial proceeded with defense counsel in possession of correct transcripts.

We leave to the judges of the Superior Court consideration of the broader principle argued by the defendant, i.e., that it

may not be in the interest of fair administration of grand jury proceedings to have stenographic or reportorial service performed by one employed in the district attorney's office, or by one only partially trained for such service.

2. The defendant argues that the judge misunderstood and misapplied the statute (G.L. c. 233, §§ 20E and 20F) with regard to the grant of immunity to the witness Brian Fernald. There is no question that Fernald was the most important witness against the defendant. The defendant's argument asserts that the district attorney used the grand jury appearance of this witness merely as a contrivance to procure immunity for him, and thus assure his cooperation with the prosecution.

The grand jury returned the indictment in this case on October 15, 1974. The witness appeared thereafter on November 14, 1974, before the same grand jury and claimed his Fifth Amendment privilege as to all questions related to the subject matter of the indictment. The Commonwealth then applied for a grant of immunity under G.L. c. 233, § 20E, and the application was allowed by a Justice of the Supreme Judicial Court on January 3, 1975. The term of the indicting grand jury had by then expired, and the witness appeared before a new grand jury on January 9, 1975, and gave testimony. Subsequently, after a voir dire hearing on the issue, the trial judge ruled that under G.L. c. 233, § 20G, the witness had immunity for the transaction in this case.

In concluding that there was no error, we observe that there was full compliance with the statutory procedure, and that immunity was properly granted before both the grand jury and the trial jury. The questions which the witness at first refused to answer, and those which he later answered, were related to the indictment and to relevant conduct of the defendant and other persons. The argument of the Commonwealth, that the testimony of the witness was procured for the

possible purpose of securing further indictments related to this defendant and this indictment, is at least as logical as the somewhat conjectural contention of the defendant that the proceedings were contrived by the district attorney for the purpose of securing immunity for the witness.

3. The defendant asserts error in the denial of his motion for a directed verdict pursuant to G.L. c. 233, § 20I, because the Commonwealth did not, as required by that statute, produce any evidence in support of the testimony of the immunized witness, Fernald, on any element of the Commonwealth's prima facie case. We do not agree.

Section 20I of c. 233, inserted by St. 1970, c. 408, provides: "No defendant in any criminal proceeding shall be convicted solely on the testimony of, or the evidence produced by, a person granted immunity under the provisions of section twenty E." In *Commonwealth* v. *DeBrosky*, 363 Mass. 718, 730 (1973), this court stated that § 20I must be read "to require that there be some evidence in support of the testimony of an immunized witness on at least one element of proof essential to convict the defendant."

The elements of proof "essential to convict" a defendant of the crime of receiving stolen goods are: (1) one must buy, receive or aid in the concealment of property which has been stolen or embezzled, (2) knowing it to have been stolen. See G.L. c. 266, § 60; *Commissioner of Pub. Safety* v. *Treadway*, Mass. , (1975).[a]

Clearly the Commonwealth's proof here resided primarily in the testimony of the immunized witness. Contrary to the defendant's argument, however, there was corroborative evidence within the requirements of the statute, as we have construed it in *Debrosky*, *supra*. There was evidence, for

[a]Mass. Adv. Sh. (1975) 2023, 2030.

example, from the owner of the heaters that they were indeed stolen in about the circumstances related by the immunized witness. More important, there was highly significant testimony from Lieutenant Bergin as to a conversation he had with the defendant during the lieutenant's investigation of the case. In summary, the defendant stated that he had seen electric heaters in his garage; that he did not know how they got there; that he did not know who removed them; and that he did not know where they were at that time. Clearly this evidence was corroborative of the testimony of the immunized witness, as required by the statute.

4. Although the defendant, through his counsel, was permitted extensive cross-examination of the immunized witness Fernald, the defendant asserts error in the judge's exclusion of two questions, addressed in recross-examination of that witness, as to the location of other fruits of the crime (some lighting fixtures and electric screwdrivers). A similar question had been asked by the prosecution on redirect examination of the same witness, and the witness answered, "I believe I kept them."

The record indicates that these two questions were excluded because the judge (and the prosecutor) considered the location of the "other fruits" as outside the scope of the immunity granted to the witness Fernald. From all that appears on the record, and taking into account that the stolen tools in particular could be considered burglarious instruments, the judge well may have interpreted the thrust of the questioning as calling for disclosure of information inculpatory of Fernald in matters not related to the break at Belnel Gardens.

We conclude that there was no error. The judge was apparently mindful of those words of caution we have frequently quoted when considering a claim of privilege under the Fifth Amendment: The test is whether it is "'*perfectly clear* . . . that the answer[s] *cannot possibly* have [a] tendency' to

incriminate. Whether a question calls for an incriminating answer must be determined in the setting in which it is asked" (emphasis original). *Gambale* v. *Commonwealth*, 355 Mass. 394, 396 (1969), quoting from *Murphy* v. *Commonwealth*, 354 Mass. 81, 84 (1968), and *Commonwealth* v. *Baker*, 348 Mass. 60, 62-63 (1964). See *Temple* v. *Commonwealth*, 75 Va. 892, 898 (1881).

In this setting the use of caution was well advised, considering also that it was not made apparent to the judge by defense counsel that restriction of this line of questioning would substantially prejudice the defendant, nor was it made clear how the answers sought could be substantially helpful to the defendant's case. Counsel for the defendant, for example, rather than cryptically referring to the witness's transactional immunity, could have requested a voir dire of the witness, outside the presence of the jury, to inquire into "whether the witness was being afforded too broad a protection based upon his privilege." *Commonwealth* v. *Douglas*, 354 Mass. 212, 225 (1968).

The defendant's argument that the judge's ruling was error of constitutional dimension fails because his contentions fall far short of those made and upheld in cases considering restrictions on cross-examination into such crucial jury issues as bias or prejudice. *Commonwealth* v. *Ferrara*, Mass. , - (1975).[b] *Davis* v. *Alaska*, 415 U.S. 308, 319 (1974). Cf. *Commonwealth* v. *Franklin*, Mass. , - (1974).[c]

5. There was no error in denying the defendant the right to cross-examine the witness Fernald concerning a telephone call by the witness to Lieutenant Bergin, who was involved in the investigation of the instant indictment. By this telephone

[b]Mass. Adv. Sh. (1975) 2064, 2069-2075.

[c]Mass. Adv. Sh. (1974) 1483, 1488-1489.

conversation, the witness is now said to have asked for, and procured, assistance from Lieutenant Bergin in avoiding some difficulty the witness was having with the police in a minor matter not related to this indictment. Presumably the question was aimed at showing proof of promises and inducements by the police. The admissibility of the excluded inquiry rested in the judge's discretion, particularly in light of the disclosure in the record before us of the rather extensive cross-examination permitted to defense counsel on the issue of promises and inducements. See *Commonwealth* v. *Granito*, 326 Mass. 494, 496 (1950); *Commonwealth* v. *Corcoran*, 252 Mass. 465, 486 (1925).

6. The Commonwealth, ordered by the court to provide the defendant with a statement of promises, rewards or inducements, answered that none had been made. Defense counsel engaged in extensive cross-examination on this issue. From all of this, no testimony was elicited to show such promises or inducements. Nevertheless, the defendant contends that this court should infer that such promises or inducements were made, particularly from a showing that the witness was treated with extreme leniency for his confessed part in the transaction. The trial judge specifically found that no such representations were made, and we conclude that the record supports his finding. The assistant district attorney did concede that the witness might have inferred that he might receive favorable consideration, but no promises were made. The defendant's argument thus fails.

7. The defendant's argument that the Commonwealth knowingly used false and misleading testimony and argument is not supported by the record. The evidence and the prosecutor's argument were concerned with a contention that some of the stolen heaters may have been installed in the home of Joan Nardozzi. This impression was conveyed to the jury, although later it was learned by the defendant that no such

installations occurred. It is argued that this untrue testimony must have been known to the prosecutor at the time it was offered before the jury.

On the contrary, the trial judge found, and we believe warrantably, that the prosecutor had no such knowledge of falsity. More detailed cross-examination by the defense as to this issue would almost certainly have resolved the controversy. Moreover, the facts of the alleged installation were only remotely, rather than immediately, related to the issue of the defendant's guilt. There was no error.

8. Finally, the defendant argues that the judge erred in denying the defendant's motion for a new trial based on the Commonwealth's failure to provide the defendant with a copy of the grand jury testimony of John Gregory.

On October 25, 1974, the defendant's motion to be furnished with evidence favorable to the accused was allowed by the judge. Subsequent to the trial, in the defendant's first motion for a new trial, he moved that the judge inspect the grand jury testimony of Gregory. He did so, and ruled some time later that "upon examination" he found no exculpatory evidence and therefore denied the motion for a new trial.

At a later date, the defendant filed another motion for a new trial, and at the hearing on that motion defense counsel informed the judge that he had now come into possession of a copy of Gregory's grand jury testimony. Defense counsel said that the copy had been obtained from Thomas Allen, who had been indicted for stealing the electric heaters involved here, and who had previously procured the transcript of Gregory's testimony by court order. The grand jury transcript discloses that Gregory had denied any participation in the larceny of the heaters, contrary to the claim of Fernald.

This court has stated the rule that: "To demonstrate constitutional error three elements must be shown: (a) suppression

by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence." *Commonwealth* v. *Gilday*, Mass. , (1975).[d] See *Commonwealth* v. *Swenson*, Mass. , (1975);[e] *Giglio* v. *United States*, 405 U.S. 150, 154 (1972); *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963).

It is argued that the circumstances of this case lend support to the defendant's claim of constitutional error. Gregory's denial of participation in the larceny, it is contended, was potentially useful for the defense in impeachment of the accusing witness Fernald, who had testified that Gregory was his accomplice in the theft. We comment here that it is far from clear to us that the defendant would gain any exculpatory advantage, even by way of impeachment of Fernald, from any denials of participation by Gregory, since such denials might well be expected by the jury, and disregarded by it as unreliable.

The defendant argues also that he was further prejudiced in that the prosecution not only failed to provide the defendant with an account of Gregory's "exculpatory" statements, but also failed to inform the defendant that Gregory had even testified before the grand jury. This, says the defendant, was a violation of the judge's pretrial order that names of grand jury witnesses should be disclosed to the defense before trial.

Even if we assume that Gregory's grand jury testimony could be considered exculpatory of the defendant, we conclude that there was no error in the denial of the motion for a new trial. The pre-trial rulings and orders of the judge, all entered without objection by the defense, make it clear that the Commonwealth reasonably could believe that it had no obli-

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[d] Mass. Adv. Sh. (1975) 1135, 1155.

[e] Mass. Adv. Sh. (1975) 2196, 2207.

gation to deliver to the defense a transcript of Gregory's testimony. The rulings of the judge as to various pre-trial motions, including those pertinent to our discussion here, were included in a lengthy court room dialogue, among the judge and counsel for both sides, on October 25, 1974. It is clear that at this conference the crucial ruling, one which fairly can be said to be controlling in all the circumstances, was that the Commonwealth was to make available to the defense only the grand jury testimony of those witnesses on whom the prosecutor intended to rely for presentation of his case at the trial of the indictment. This order was complied with and it was, in our view, reasonable for the prosecutor to assume that he need do no more with respect to the statements of grand jury witnesses.

For additional reasons, our conclusion reaches a fair and just result. It appears clear that the defendant now concedes that he was aware before trial of the alleged participation by Gregory in the crime. While this knowledge alone may not be determinative (see *Jackson* v. *Wainwright*, 390 F. 2d 288, 298 [5th Cir. 1968]), we consider it together with the fact that the "exculpatory" testimony consisted of the undoubtedly predictable denial by Gregory of criminal conduct. In light also of the judge's order for merely limited disclosure of the testimony of grand jury witnesses, it is clear that neither the letter nor the spirit of the principle of the *Brady* case, *supra*, was violated. The entire circumstances, also, lend considerable support to the Commonwealth's argument that the failure to produce Gregory was an informed tactical decision of the defendant.

Judgment affirmed.

Appendix B.

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH.

COURT HOUSE

BOSTON

FREDERICK J. QUINLAN
CLERK

WILLIAM M. CLORAN
ASSISTANT CLERK

April 13, 1976

Melvin S. Louison, Esq.
Louison and Cohen, P. C.
495 Westgate Drive
Brockton, Massachusetts 02401

Dear Mr. Louison: Re: *Commonwealth* v. *Donahue*
SJC-409; 1976 A.S. 793.

Your request for rehearing in re the above captioned case has been considered by the court and is denied.

Very truly yours,

FREDERICK J. QUINLAN, Clerk.

c.c.: William D. Delahunt, Dist. Atty.
Norfolk County Superior Court
650 High Street
Dedham, Massachusetts 02401

Appendix C.

Statement of Brian Fernald Read to Grand Jury.

[1] D.A. May: The first bit of evidence that is going to be introduced to you this morning is a statement of one Brian Fernald. The statement was made in the District Attorney's Office, Superior Court here in Dedham on May 22, 1974. The statement was made in the presence of Assistant District Attorney Paul Cusick, State Police Detective Lieutenant Bergin, Captain James R. Kelly of the Stoughton Police, and Miss Sheri Lubao who is here. I am reading the [2] statement into the record at this point because Mr. Fernald is a fugitive from Justice. We have been attempting to locate him for some weeks. We have searched and caused to be searched places within and out of the Commonwealth of Massachusetts. I have not with me, but I do have copies of teletypes that we have sent to various police agencies trying to locate Mr. Fernald. I should tell you that Mr. Fernald came to the attention of the District Attorney's Office as a result of certain information in which he gave to the Canton Police; and as a result of the statement he made to the Canton Police, he was referred to the District Attorney's Office. Rather than pass out copies, I think that for this statement to make sense that Paul Cusick will read the part of Lieutenant Bergin, who conducted the interrogation, and I will read the part which is Mr. Fernald's responses to that interrogation. In that way, you can perhaps more properly evaluate the testimony that Mr. Fernald gave. With that, Paul, why don't you begin on page one.

D.A. Cusick: Lt. Bergin: "For the record, I am going to introduce everyone here present. Speaking, I am Lieutenant William Bergin, Massachusetts State Police, assigned to the District Attorney's Office. This is Assistant District Attorney

Paul Cusick, [3] assigned to George Burke's office also; and, of course, I am sure you know Captain Kelly of the Stoughton Police Department. I understand that you have a story to tell us; but prior to stating anything, I wish to give you your rights under the Miranda, so-called Miranda Laws. You have a right to remain silent. Anything you say can and will be used against you in a Court of Law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish. Do you understand what I just said? Do you? Speak up." D.A. MAY: "Yes."

D.A. CUSICK: "Yes. You do. Do you understand each of these rights that I have explained to you?" D.A. MAY: "Yes, I do."

D.A. CUSICK: "Having these rights in mind, do you wish to talk to us now?" D.A. MAY: "Yes."

D.A. CUSICK: "All right, now regarding, we are going to, would you identify yourself?" D.A. MAY: "Brian R. Fernald."

D.A. CUSICK: "Spell your last name." D.A. MAY: "F-e-r-n-a-l-d."

D.A. CUSICK: "And, where do you live, Brian?" D.A. MAY: "163 Pleasant Street, Stoughton."

[4] D.A. CUSICK: "And, what's your date of birth?" D.A. MAY: "9/25/51."

D.A. CUSICK: "Do you recall your Social Security Number?" D.A. MAY: "027-42-2747."

D.A. CUSICK: "Okay. Now, I understand you have talked with Canton Police, as well as Stoughton Police." D.A. MAY: "That's right."

D.A. CUSICK: "I'm particularly interested in the Stoughton Police Department and the statement that you made about

involvement, involvement with certain members of that police department." D.A. MAY: "Right."

D.A. CUSICK: "Would you relate to us here and now what involvement, if any, you had with members of the Stoughton Police Department?" D.A. MAY: "Well, with Thomas Allen."

. . . . . .

[7] D.A. CUSICK: "Just the two of you?" D.A. MAY: "Yah."

D.A. CUSICK: "Have you worked with Allen on any other larcenies?" D.A. MAY: "One, but it wasn't — he didn't work with me actually. I did the larceny; all he d' was give [8] me, you know, gave me a car to use."

D.A. CUSICK: "He gave you a car to use?" D.A. MAY: "Right."

D.A. CUSICK: "Okay, now what did this larceny comprise of?" D.A. MAY: "Electric heat, electric heating."

D.A. CUSICK: "Ducts?" D.A. MAY: "Right."

D.A. CUSICK: "And, where did this larceny take place?" D.A. MAY: "On River Street in Hyde Park."

D.A. CUSICK: "River Street in Hyde Park." D.A. MAY: "It was either Hyde Park or Mattapan. I'm not sure which — on River Street."

D.A. CUSICK: "So, you and did anyone else work on that larceny with you?" D.A. MAY: "Yah."

D.A. CUSICK: "Who?" D.A. MAY: "Jackie, John Gregory."

D.A. CUSICK: "John Gregory?" D.A. MAY: "Right."

D.A. CUSICK: "Where is he from?" D.A. MAY: "He's from Brockton."

D.A. CUSICK: "Brockton?" D.A. MAY: "South Street in Brockton."

D.A. CUSICK: "And, both you and Gregory went over to this place in Hyde Park?" D.A. MAY: "Yah."

D.A. Cusick: "Did you B&E the place?" D.A. May: "No, we just walked in."

[9] D.A. Cusick: "Walked in, no security? You just picked up those heating elements and walked out?" D.A. May: "Yah."

D.A. Cusick: "How did you transport them?" D.A. May: "In the Chief of Police's car."

D.A. Cusick: "In the Chief of Police of whose car?" D.A. May: "Stoughton."

D.A. Cusick: "Stoughton?" D.A. May: "Yah."

D.A. Cusick: "How did you manage to get the Chief's car?" D.A. May: "Tommy Allen gave it to us."

D.A. Cusick: "Tommy Allen gave you the Chief's car?" D.A. May: "That's right."

D.A. Cusick: "How did Allen get the Chief's car?" D.A. May: "I don't know."

D.A. Cusick: "Was this a Town vehicle with a radio?" D.A. May: "Yah, it had the radio right there."

D.A. Cusick: "All right, what did you do with these heating elements?" D.A. May: "We brought them back to where Tommy Allen was. That was at his car. His girlfriend, Joan Nardozzi's. We went there and we saw him."

D.A. Cusick: "Saw who?" D.A. May: "Tommy Allen."

D.A. Cusick: "Right." D.A. May: "About selling them, he was supposed to have them sold plus he made arrangements to give some of them to the Chief."

[10] D.A. Cusick: "He made arrangements to give some of the heating elements to the Chief?" D.A. May: "Right."

D.A. Cusick: "The Chief of Police of Stoughton?" D.A. May: "Right."

D.A. Cusick: "What's his name?" D.A. May: "John Donahue."

D.A. Cusick: "John Donahue?" D.A. May: "Right."

D.A. Cusick: "Did Allen tell you that prior to going on the break or on this larceny that he was taking care of the Chief with some heating?" D.A. May: "Right, that's right."

D.A. Cusick: "All right, what did you do then after you got back to Allen's girlfriend's house and talked with Allen?" D.A. May: "We went to the Chief's house, and we dropped off, I think, it was either 10 or 12 lengths, four-foot lengths of heating, and put it in the Chief's garage. When we went into the house, we went into the Chief's house first and asked him where he wanted it. He said, "Put it in the garage for now."

D.A. Cusick: "You went in, you and Allen both went into the Chief's house?" D.A. May: "Right."

D.A. Cusick: "and you told him that you had these heating elements?" [11] And asked him where he wanted them?" D.A. May: "And he said, 'Put them in the garage.'"

D.A. Cusick: "Did he know that these were stolen elements?" D.A. May: "I imagine so. I never said that they were stolen, but he knew. You have to know that they were stolen, if he was getting them — you know. He told me Allen was giving it to him for nothing."

D.A. Cusick: "Where are these elements now, if you know?" D.A. May: "I'm pretty sure they're installed in the Chief's house. I haven't been in the Chief's house since, but they were supposed to be installed in his house."

. . . . . .

Appendix D.

GRAND JURY TESTIMONY OF JOHN GREGORY.

[18] D.A. MAY: . . . the whole truth and nothing but the truth so help you God? MR. GREGORY: I do.

D.A. MAY: Before you proceed to give any testimony, Mr. Gregory, I want to advise you of your rights. You have a right to remain silent. Anything you say may and will be used against you in a Court of Law. You have a right to an attorney. Although you are not afforded the right to have an attorney in this room, one can be outside, and you can consult with him as the questioning goes on. Do you understand that? MR. GREGORY: Yes.

D.A. MAY: Do you understand your right to remain silent? MR. GREGORY: Yes.

D.A. MAY: Do you understand that anything you say can be used against you? MR. GREGORY: Yes.

D.A. MAY: In a Court of Law. If you cannot afford an attorney, one will be appointed for you. Do you understand that? MR. GREGORY: Yes.

D.A. MAY: Mr. Gregory, having been advised of these rights, do you wish to testify before this Grand Jury? MR. GREGORY: Yes.

D.A. MAY: Okay. You may be seated. What is your name? MR. GREGORY: John Gregory.

D.A. MAY: Would you spell your last name please? [19] MR. GREGORY: G-r-e-g-o-r-y.

D.A. MAY: And, Mr. Gregory, would you kindly speak up so everybody can hear you? Where do you reside? MR. GREGORY: 510 Derry Park Drive, Middleboro.

D.A. MAY: And, are you employed? MR. GREGORY: Yes.

D.A. MAY: And, what is your occupation? MR. GREGORY: Bulldozer operator.

D.A. MAY: And, are you married? MR. GREGORY: Yes.

D.A. MAY: And, do you have a family? MR. GREGORY: One baby girl.

D.A. MAY: And, do you live with her? MR. GREGORY: Yes.

D.A. MAY: Have any promises or rewards been offered to you by members of the District Attorney's staff or the State Police? MR. GREGORY: No.

D.A. MAY: Have any members of the District Attorney's office or the State Police threatened you? MR. GREGORY: No.

D.A. MAY: Have they coerced you in any way? MR. GREGORY: No.

D.A. MAY: Has anybody else threatened or coerced you? MR. GREGORY: No.

D.A. MAY: Are you presently under any medication? MR. GREGORY: No.

D.A. MAY: Are you presently under any drugs? [20] MR. GREGORY: No.

D.A. MAY: Are you presently under the care of a physician? MR. GREGORY: No.

D.A. MAY: And, any statement that you give us will be of your own free will? MR. GREGORY: Yes.

D.A. MAY: You understand that you have the ability to exercise your Fifth Amendment privileges if you so desire at any time? MR. GREGORY: Yes.

D.A. MAY: Okay. Mr. Gregory, do you know Brian Fernald? MR. GREGORY: Yes.

D.A. MAY: Do you know what his nickname is? MR. GREGORY: Monk.

D.A. MAY: And, how long have you known Brian Fernald? MR. GREGORY: About 2½, 3 years.

D.A. MAY: Was he a friend of yours? MR. GREGORY: Yah, I guess you could say so, yah.

D.A. MAY: Did you associate with him from time to time? MR. GREGORY: Yes.

D.A. MAY: Did he know you? MR. GREGORY: Yes.

D.A. MAY: Have you ever had any arguments or fights with Brian Fernald? MR. GREGORY: Yes.

D.A. MAY: On many occasions? MR. GREGORY: No.

D.A. MAY: Mr. Gregory, do you recall having a conversation [21] with me this morning? MR. GREGORY: Yes.

D.A. MAY: And, did I read you a certain statement of Brian Fernald? MR. GREGORY: Yes.

D.A. MAY: I'm going to now read that to you again, Mr. Gregory.

Q. "Have you worked with Allen on any other larcenies?" A. "One, but he didn't work with me actually. He, I did the larceny. All he did was give me a, you know, gave me a car to use."

Q. "He gave you a car to use?" A. "Right."

Q. "Okay. How, what did this larceny comprise of?" A. "Electric heat, electric heating."

Q. "Ducts?" A. "Right."

Q. "Where did this larceny take place?" A. "On River Street in Hyde Park."

Q. "River Street in Hyde Park?" A. "It was either Hyde Park or Mattapan. I'm not sure which on River Street.

Q. "So you, and did anyone else work on that larceny with you?" A. "Yah."

Q. "Who?" A. "Jackie, John Gregory."

Q. "John Gregory?" A. "Right."

[22] Q. "Where is he from?" A. "He's from Brockton."

Q. "Brockton?" A. "South Street in Brockton."

Q. "Both you and Gregory went into this place in Hyde Park?" A. "Yes."

Q. "Did you B & E the place?" A. "No. We just walked in."

Q. "Walked in. No security. You just picked up those heating elements and walked out?" A. "Yah."

Q. "How did you transport them?" A. "In the Chief of Police's car."

Is that a true statement, Mr. Gregory? MR. GREGORY: No.

D.A. MAY: Were you a friend of his in November of 1973? MR. GREGORY: Yes.

D.A. MAY: What was your occupation then? MR. GREGORY: The same thing. I was working — I worked for my father then. Where he's talking about in Hyde Park, it's housing for the elderly, and I worked there, and I brought Brian in there one day because he was looking for work, and he was a carpenter. My father, you know, they needed some people in there, but he went in, and he was supposed to go back the next day, but the next day he didn't go back in there, and the boss on the job, the next morning [23] when I went in there, he wanted to know Brian's address, his name and address and stuff, and he, you know, told me that something was stolen. I don't know if someone seen Brian in there or what, but the guy was sure it was him, you know.

D.A. MAY: And, did you ever go to that construction site with Brian Fernald in somebody's car? MR. GREGORY: Yes.

D.A. MAY: Could you describe the car that you went in? MR. GREGORY: About a 73, 72 Ford station wagon, green.

D.A. MAY: Green? Did it have a police radio in it? MR. GREGORY: No.

D.A. MAY: Did Brian Fernald ever tell you he used the Chief of Police's car? MR. GREGORY: No.

D.A. MAY: Did Brian Fernald ever tell you he was a friend of the Chief of Police? MR. GREGORY: Yes.

D.A. MAY: Did Brian Fernald ever tell you that he committed certain larcenies? MR. GREGORY: Yes.

D.A. MAY: Did you ever commit any larcenies with Brian Fernald? MR. GREGORY: No.

D.A. MAY: Did Brian Fernald ever tell you that the Chief of Police was involved in these larcenies? MR. GREGORY: Yes.

D.A. MAY: Did Brian Fernald ever tell you that Patrolman Allen was involved in any of these larcenies? [24] MR. GREGORY: Yes.

D.A. MAY: Did you have occasion to work at Joan Nardozzi's house in Stoughton? MR. GREGORY: Yes. I did.

D.A. MAY: What service did you perform there? MR. GREGORY: I put up some dry wall in the garage. They were making the garage into a playroom, and Brian had the job, and I just did some dry walling for him there after work to make some extra money.

D.A. MAY: When was this? MR. GREGORY: This was last year, around — I think it was after November though. I think it was like in January.

D.A. MAY: I see, and do you know whether or not any windows were installed there? MR. GREGORY: Yes.

D.A. MAY: And, were any glass doors installed there? MR. GREGORY: Yes.

D.A. MAY: And, who installed them? MR. GREGORY: Brian, I guess. I only worked there at night. I didn't work there during the day.

D.A. MAY: Did you see them installed? MR. GREGORY: After they were installed, I seen them. I seen them before they were and then after they were installed I seen them.

D.A. MAY: Did you know that they were stolen? MR. GREGORY: No.

D.A. MAY: Did Patrolman Allen ever tell you they were stolen? MR. GREGORY: No.

[25] D.A. MAY: Did Mr. Fernald ever tell you they were stolen? MR. GREGORY: Not until later, you know after.

D.A. MAY: Did Miss Nardozzi ever tell you they were stolen? MR. GREGORY: No. She isn't the type of person. If she knew they were stolen, she wouldn't of had them there. She's not, you know.

D.A. MAY: Were you paid for that work? MR. GREGORY: No. I wasn't.

D.A. MAY: Did Mrs. Nardozzi ever pay you? MR. GREGORY: No. She paid Brian, and Brian was supposed to pay me, but he just kept the money for himself.

D.A. MAY: Did Brian use drugs? MR. GREGORY: Yes.

D.A. MAY: Did you use drugs? MR. GREGORY: I have before, yes.

D.A. MAY: What kind of drugs were you using? MR. GREGORY: When?

D.A. MAY: A couple of years ago. MR. GREGORY: Heroin.

D.A. MAY: And, have you gone to some type of rehabilitation program? MR. GREGORY: Yes.

D.A. MAY: And, you're no longer using drugs? MR. GREGORY: No.

D.A. MAY: Is it your testimony, Mr. Gregory, that you have never committed any larceny with Brian Fernald? MR. GREGORY: Right.

D.A. MAY: Have you ever committed any larcenies with any [26] members of the Stoughton Police Department? MR. GREGORY: No.

D.A. MAY: Do you have any information or knowledge that members of the Stoughton Police Department were involved in larcenies? MR. GREGORY: I do now.

D.A. MAY: Prior to your conversation with me, did you

have any information? MR. GREGORY: Just from that Mr. Bergin.

D.A. MAY: Prior to your interview with Detective Lieutenant Bergin, did you have any knowledge? MR. GREGORY: Just things I've heard, you know. I've never seen anything or anything like that. Just hearsay.

D.A. MAY: Well, who would you have heard that from? MR. GREGORY: Just kids around town and stuff.

D.A. MAY: Have you ever been arrested? MR. GREGORY: Yes.

D.A. MAY: Have you ever been convicted of any crime? MR. GREGORY: Yes.

D.A. MAY: On what crime did you get convicted? MR. GREGORY: B & E, breaking and entering and assault and battery.

D.A. MAY: Did you ever commit any larcenies to support your drug habit? MR. GREGORY: Yes.

D.A. MAY: Did you and Brian Fernald ever take drugs together? MR. GREGORY: Yes.

D.A. MAY: Last November, were you on drugs? MR. GREGORY: No.

[27] FOREMAN: Any questions of the Jury?

GRAND JUROR: Can you think of any reason why Mr. Fernald would associate you with the theft of these, the theft over there on River Street near Hyde Park and that thing. In other words, why should he testify to the police lieutenant and mention your name if you weren't there? MR. GREGORY: I brought him to the job.

GRAND JUROR: You brought him to the job? MR. GREGORY: But, I brought him there to get a job not to steal anything, you know, and —

GRAND JUROR: Where were you when this alleged theft took place? Were you anywheres near the premises or were

you — MR. GREGORY: I don't think so. I don't know when it happened. It didn't happen that day. It happened at night. You know, I was, my father-in-law had just had a heart attack, and I was at the hospital with my wife.

GRAND JUROR: In other words, you brought Mr. Fernald there that day to get a job? MR. GREGORY: Right.

GRAND JUROR: And, he says you were with him during the robbery or the B & E. Whatever you call it. You say you were not there that night? MR. GREGORY: Right.

GRAND JUROR: Is that it? MR. GREGORY: Yes.

FOREMAN: Yes.

[28] GRAND JUROR: You said you did have an argument with Brian. Was it regarding the nonpayment from the installation work you did at that girl's house? MR. GREGORY: Yes. It was that and around that same time when Brian — you know — when I did that job with Brian, someone broke into my house and stole my TV.

GRAND JUROR: What kind of a TV was it? MR. GREGORY: Colored TV, colored portable.

GRAND JUROR: Nineteen inch by any chance? MR. GREGORY: I don't know. It might have been. Yah. Eighteen, Nineteen inch, yah.

FOREMAN: Yes, ma'am.

GRAND JUROR: Were you living in Brockton in South Street at the time. You mentioned you're living in Middleboro now? MR. GREGORY: Yes. I was living in Brockton when this all happened.

GRAND JUROR: You testified that you heard some rumors from some of the kids in town about some episode going on in Stoughton. Which town were you referring to? MR. GREGORY: Stoughton. The kids in Stoughton.

GRAND JUROR: The kids in Stoughton? MR. GREGORY: Yah.

GRAND JUROR: So, you have friends in Stoughton? MR. GREGORY: Yes.

FOREMAN: Yes.

GRAND JUROR: When you were — when this robbery took place, you say you were at the hospital? MR. GREGORY: Yes.

[29] GRAND JUROR: Can you have someone back you up on that, that, could someone make a statement saying that you were at the hospital at that particular time? MR. GREGORY: Well, my mother-in-law was there and my wife.

GRAND JUROR: Outside of them, anybody else, nurses or anybody else outside the family? MR. GREGORY: Probably the nurses. Yah. They probably would. I don't even remember everything that far back, every little thing, you know.

D.A. MAY: I think I want to advise you again, Mr. Gregory, that you do have the right to exercise your Constitutional privilege and not answer if you like. MR. GREGORY: You don't want me to answer?

D.A. MAY: No. I'm just saying that I want you to be aware that you do have that right.

D.A. CUSICK: Mr. Gregory, are you from Stoughton? MR. GREGORY: Well, when I was real small I was from Stoughton, but I moved to Wareham when I was in the seventh grade I think, seventh or eight grade.

D.A. CUSICK: And, with reference to the job we're talking about in Greenbrook — MR. GREGORY: In where?

D.A. CUSICK: Island Street, all right, I'm sorry, Hyde Park. Your father's job. You took Brian over there. MR. GREGORY: Yes.

D.A. CUSICK: Did you know the security arrangements there at all? Did you know who the night watchmen were? MR. GREGORY: It wasn't built yet. It was being built.

[30] D.A. CUSICK: Did they have anyone there in a night watchman capacity? MR. GREGORY: I wouldn't know.

FOREMAN: Any other questions of the Jury? Yes.

GRAND JUROR: Did you normally hang out in the town of Stoughton? MR. GREGORY: No.

GRAND JUROR: You didn't. MR. GREGORY: No. Before I was married, I got in a lot of trouble. You know, I was into drugs, and I got in a lot of trouble in Stoughton and so I still don't go. The only reason I go there now is cause my mother-in-law lives there, and I go there with my wife, you know, but I try to keep away from Stoughton, you know, because I did get in a lot of trouble there, and I don't get along there.

GRAND JUROR: To what degree was your falling out with Mr. Fernald. I mean, did you have fist fight or did you just have an argument? MR. GREGORY: An argument.

GRAND JUROR: Have you seen him since the argument? MR. GREGORY: No. Well, yah, I saw him after that. Yes, I have. Yah.

GRAND JUROR: Did you renew your friendship? MR. GREGORY: Not really renewed my friendship, but you know, I talked to him after that.

FOREMAN: Yes.

GRAND JUROR: Were you friends at school, you and Brian? [30] MR. GREGORY: No.

GRAND JUROR: Did you grow up together in Stoughton? MR. GREGORY: No. I met Brian when he come out of the service.

GRAND JUROR: Just a few years ago? MR. GREGORY: Yah. I think it was about, around 3 years ago.

FOREMAN: Yes.

GRAND JUROR: This breaking and entering in your home, was that reported to the police? MR. GREGORY: Yes.

GRAND JUROR: It was.

FOREMAN: Yes, ma'am.

GRAND JUROR: How long have you been off of drugs? MR. GREGORY: 2½, 3 years.

FOREMAN: Any further questions? Thank you very much, Mr. Gregory.

Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 75-1850.

JOHN F. DONAHUE,
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v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Brief in Opposition to Petition for Certiorari.

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Statement of Proceedings and Facts.

Respondent accepts petitioner's statement of proceedings and facts. Additional facts will be stated in Argument.

Argument.

1. THERE WAS NO CONSTITUTIONAL ERROR IN THE FAILURE TO DISCLOSE THE GRAND JURY TESTIMONY OF GREGORY.

Petitioner's first contention is that the grand jury testimony of one Gregory was exculpatory evidence unconstitutionally suppressed by the prosecutor. Fernald testified at the trial that he stole some heaters and delivered them to the petitioner, and that Gregory participated in the theft

and delivery (Tr. 80-82, 85, 88).* Gregory was not called as a trial witness for either side, but in his grand jury testimony he denied that he participated in the theft (Petition, Appendix D at 45, 46). It is Gregory's denial of guilt that is said to be exculpatory because it might have been used to impeach Fernald.

The constitutional standards for reversal because of suppressed exculpatory evidence have been reviewed by this Court as recently as June of this year. *United States* v. *Agurs,* 44 U.S.L.W. 5013 (1976). The present case is not a situation where the prosecution used perjured testimony or knew or should have known of the perjury. Nor is this a case where a specific request for relevant evidence was ignored. Here, when the defense moved to inspect the grand jury minutes, the prosecutor submitted the problem to the court (R. 18, court's notation thereon). The prosecutor thereafter fully complied with the judge's order to disclose the grand jury minutes of only those witnesses whom it intended to class as trial witnesses (*Commonwealth* v. *Donahue,* Mass. Adv. Sh. (1976) 793, 808-809, 344 N.E. 2d 886, 893, Petition, Appendix A at 32; see R. 18). It follows that no constitutional error was committed unless the omitted evidence of Gregory's denial "creates a reasonable doubt that did not otherwise exist." *United States* v. *Agurs, supra,* 44 U.S.L.W. at 5017.

Like the misidentification of the elusive "Slick" in *Moore* v. *Illinois,* 408 U.S. 786 (1972), Gregory's predictable denial of participation in the theft is at best an insignificant factor. Fernald gave detailed testimony of the theft of the heaters and the delivery of twelve of them to the petitioner's home address (Tr. 80-82, 85, 88). The heaters were unloaded into the petitioner's garage while the petitioner stood on the porch about 15-30 feet away (Tr. 87). This occurred after the petitioner came out of the house with Allen and pointed toward the garage (Tr. 86, 94-95). Petitioner admitted to the state police and to the jury that he saw the heaters in his garage, although he claimed he did not know how they got there or how they were removed (Tr. 172-173, 228, 233-235).

* References to the transcript of evidence will be designated by "Tr." References to the volume of documents entitled "Defendant's Claim of Appeal" also known as the "Record," will be designated by "R."

Following the jury's guilty finding, the trial judge twice considered Gregory's self-serving grand jury denial, and twice ruled that the evidence was not exculpatory. Additionally, the Massachusetts Supreme Judicial Court correctly concluded under the *Moore* test that it is far from clear that the defendant would gain any exculpatory advantage from Gregory's claim of innocence even by way of impeachment of Fernald. No reasonable doubt about petitioner's guilt existed on the evidence presented, and no new reasonable doubt could possibly be raised by a cohort's predictable denial of guilt.

One final point cannot be overlooked. It is clear that the defendant knew before trial that Fernald named Gregory as a participant. *Commonwealth* v. *Donahue,* Mass. Adv. Sh. (1976) at 809, 344 N.E. 2d at 893, Petition, Appendix A at 32. Yet the defense failed to call Gregory as a trial witness, an informed decision which can only be viewed as deliberate trial strategy. In view of these circumstances, there can be no genuine basis for a claim of suppressed exculpatory evidence and a lack of fairness to the defendant.

2. There Was No Constitutional Error with Respect to the Disclosure of Promises, Rewards or Inducements.

The non-disclosure of information is again raised in Point 2 of the petition as a basis for claiming constitutional error. Specifically, the petitioner asserts that there was a

failure by the prosecutor to disclose: (a) a promise by police officer Rafferty to keep the witness Fernald "on the street," and (b) a statement by the prosecutor to Fernald that he could be sentenced for up to 17 years and that he would be crazy to take a prison term. The defense was in fact fully aware of the substance of these statements. Fernald was vigorously cross-examined about both statements. Upon cross-examination, Fernald admitted the fact of the Rafferty statement concerning a favorable bail recommendation on May 22, 1974 (R. 35-36, Tr. 103-104; see also Tr. 176 where defense counsel shows another witness a written statement of Officer Rafferty concerning bail for Fernald). Fernald also admitted upon cross-examination that the prosecutor made a statement about the possibility of a 17 year sentence (Tr. 130, 159; see Tr. 144-145). In view of the fact that Fernald did not deny the statements, there is no possible issue concerning perjured testimony in this case. Cf. *Giglio* v. *United States,* 405 U.S. 150 (1972).

Additionally, the defense and the jury knew at the time of the trial that Fernald had been guaranteed transactional immunity by the Supreme Judicial Court (Tr. 63-71, 125-127), perhaps the best possible inducement in this case. It follows that additional earlier promises concerning bail or other pending charges could not create a reasonable doubt about guilt that did not otherwise exist. *United States* v. *Agurs, supra,* 44 U.S.L.W. at 5017.

3-4. Petitioner Was Not Denied the Right to Confront and Cross-Examine the Witness Fernald.

The petitioner asserts that the failure to allow cross-examination of Fernald on the location of some stolen equipment deprived him of the right to confrontation. Two questions on this point were excluded: (1) the present location of the light fixtures (Tr. 164-165) and (2) the

present location of stolen electric screwdrivers (Tr. 165). Petitioner's assertion of constitutional error is meritless for several reasons. Petitioner was in fact afforded the right to conduct extensive cross-examination of Fernald (Tr. 96-142, 158-168). Secondly, the questions in issue were somewhat repetitive in that Fernald had twice testified that he himself kept the light fixtures (Tr. 154, 164). Moreover, the relevance of the present location of the equipment, even to show bias, is tenuous at best, and the exclusion of such tangential evidence certainly does not amount to constitutional error. Cf. *Davis* v. *Alaska,* 415 U.S. 308, 319 (1974). Finally, as the Supreme Judicial Court noted in thoroughly reviewing this issue, the questions could well have been leading to other criminal activity of the witness not protected by his transactional immunity. *Commonwealth* v. *Donahue,* Mass. Adv. Sh. (1976) at 802, 344 N.E. 2d at 891, Petition, Appendix A at 25-26. In these circumstances, allowing the witness to rest on the Fifth Amendment privilege was well within the trial judge's discretion.

Petitioner also claims that he was denied the right of confrontation by the exclusion of a cross-examination question concerning a telephone call from Fernald to a state police lieutenant. According to petitioner's offer of proof, Fernald was under arrest in Boston on an apparently unrelated matter when he called the state police lieutenant (Tr. 139). The lieutenant is said to have assisted Fernald in "retriev[ing] his car when he was bailed out." When first raised, the trial judge did not permit this line of questioning (Tr. 138). Later, however, defense counsel cross-examined Fernald without objection on this point (Tr. 165-166). Counsel's offer of proof was not borne out by the evidence. Fernald specifically denied that the state police or district attorney's office gave him any promises of assistance concerning a case pending against him in Boston

(Tr. 165-166). Fernald then began to explain something about the Boston case, but defense counsel dropped this line of cross-examination (Tr. 166).

When Fernald flatly denied any state police assistance on his Boston case, the defense counsel on cross-examination did not pursue or refute this denial (Tr. 165-166). When the hoped-for evidence of inducements did not materialize, counsel simply chose another line of inquiry (Tr. 166). The trial judge's initial reluctance to allow some questioning on possible inducements in the Boston case, gave way to the point where there was lengthy, almost open-ended questions by petitioner's counsel on all possible inducements (Tr. 103-104, 123, 125-127, 130-131, 158-164, 162). On these facts, there is absolutely no basis for the claim that the right of confrontation was denied.

5. Petitioner's Conviction Was Supported by Evidence.

In Massachusetts, the elements of the crime of receiving stolen property are: (1) one must buy, receive or aid in the concealment of stolen property, (2) knowing that the property was stolen. G.L. c. 266, § 60; *Commonwealth* v. *Donahue,* Mass. Adv. Sh. (1976) 793, 800, 344 N.E. 2d 886, 890. Fernald testified that after Allen provided him a car, he and Gregory stole some heaters in Boston and returned to Stoughton. Some of the heaters were later delivered to petitioner's home address. Fernald testified that Allen went inside and came back out with the petitioner (Tr. 86). Fernald stated that petitioner gestured or pointed to his garage (Tr. 86, 94-95). While the petitioner stood approximately 15 to 30 feet away, Fernald unloaded the heaters into petitioner's garage (Tr. 87). Petitioner himself admitted to the state police and in trial testimony that he saw the heaters in his garage, but did not know how they got there, or how they were removed (Tr. 172-173, 228, 233-235). This evidence pro-

vided an ample basis for the jury's conclusion that petitioner received or aided in concealing the heaters knowing that they were stolen. *Commonwealth* v. *Ryan,* 355 Mass. 768, 247 N.E. 2d 564 (1969); *Commonwealth* v. *Ventola,* Mass. App. Ct. Adv. Sh. (1973) 545, 300 N.E. 2d 918, 923; *Commonwealth* v. *Wilbur,* 353 Mass. 376, 384-385, 231 N.E. 2d 919 (1967), *cert. den.* 390 U.S. 1010 (1968).

The claim of no evidence is without merit.

6. The Prosecutor Did Not Knowingly use False Testimony, and in any Event There was No Reasonable Likelihood that the Questioned Evidence could have Affected the Jury.

A possible implication in the cross-examination testimony of defense witness Gambrazzio (Tr. 213) and in the prosecutor's closing argument (Tr. closing argument 30) is that heaters installed in Joan Nardozzi's house were heaters stolen by Fernald. In his second motion for a new trial, defense counsel argued that police investigators knew that these particular heaters were not stolen (Tr. M. for New Trial 7/3/75 at 9-10). This is the sole basis for the claim that the prosecutor knowingly used false testimony.

If the implication was false (and the record does not so demonstrate), there is absolutely no reason to disturb the trial judge's finding that any false impression "was without knowledge or conscious attempt" by the prosecutor to instill a false impression (R. 56). Secondly, there is simply no reasonable likelihood that a false impression about heaters in Nardozzi's home could have affected the jury's judgment on whether or not petitioner Donahue was guilty of receiving stolen property. *United States* v. *Agurs, supra,* 44 U.S.L.W. 5013, 5015; *Giglio* v. *United States,* 405 U.S. 150, 154 (1972).

7-8. Petitioner's "Collective Impact" Arguments Do Not Establish Constitutional Error.

The bulk of petitioner's arguments in points 7 and 8 merely repeat his arguments in points 1-6, and these arguments have been addressed individually in this brief.

Petitioner cites no authority, and the respondent is aware of no authority, for the novel proposition that the failure to indict other persons is a violation of petitioner's constitutional rights. Whether or not other persons should be indicted must depend on what individual evidence is available against each other person and on whether the prosecution of other persons would be in the overall best interest of the Commonwealth. These questions cannot be answered on the present record, and they are irrelevant to the lawful prosecution of the petitioner.

Petitioner concedes that he did not request a special accomplice instruction (Petition at 18); his first request for such an instruction is inappropriately addressed to this Court. This is an issue that should have properly been presented to the trial court and the state appellate court. A *sua sponte* accomplice instruction is not an absolute requirement of constitutional law imposed on the states by the Fourteenth Amendment. *Cf. Crawford* v. *United States*, 212 U.S. 183 (1909).

Conclusion.

The respondent respectfully submits that the record does not demonstrate any constitutional error and that the petition for certiorari should be denied.

Respectfully submitted,

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